92-1784

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempt state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products?

2. Does the statutory and regulatory regime that was established after FIFRA was comprehensively revised in 1972 now operate to preempt even those state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were manufactured, labeled, distributed, and sold prior to the 1972 revision of FIFRA and its introduction of an express preemption provision relating to labeling and packaging?

3. Where (i) a previous petition for certiorari in this case presented both of the above questions for review and argued, with respect to each of those two questions, that the holding of the United States Court of Appeals for the Tenth Circuit in this case was contrary to this Court's analysis in the intervening decision of *Cipollone v. Liggett Group, Inc.*, 505 U.S. —— (1992), and (ii) this Court granted that petition without qualification, vacated the judgment of the Court of Appeals in its entirety, and remanded the case for further consideration in light of *Cipollone*, did the Court of Appeals then err by narrowly construing this Court's order and refusing to reconsider the holding that current FIFRA, rather than pre-1972 FIFRA, governs the preemption analysis with respect to state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the comprehensive revision of FIFRA in 1972 and its introduction of an express preemption provision relating to labeling and packaging?

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ARKANSAS-PLATTE & GULF PARTNERSHIP,
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Arkansas-Platte & Gulf Partnership respectfully petitions for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Tenth Circuit, issued after this Court vacated an earlier opinion of the Court of Appeals and remanded the case for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608 (1992).

OPINIONS BELOW

The opinion of the Court of Appeals following remand from this Court is reported at 981 F.2d 1177 (10th Cir. 1993) and is reproduced in the appendix to this petition ("Pet. App.") at 1a. The original opinion of

the Court of Appeals, *see* Pet. App. 30a, is reported at 959 F.2d 158 (10th Cir. 1992). The opinion of the United States District Court for the District of Colorado, *see* Pet. App. 7a, is reported at 748 F. Supp. 1474 (D. Colo. 1990).

JURISDICTION

The opinion and order of the Court of Appeals following remand from this Court was entered on January 5, 1993. *See* Pet. App. 1a. A timely motion for rehearing was denied on February 9, 1993. *See* Pet. App. 48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

> § 136v. Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> * * * *
>
> § 136(p) Label and labeling.—
>
> (1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

1. The federal preemption questions presented here arise out of a products liability suit involving pesticide products containing the chemical pentachlorophenol ("penta"). Petitioner Arkansas-Platte & Gulf Partnership ("AP&G") filed its complaint against respondents The Dow Chemical Company ("Dow") and Van Waters & Rogers, Inc. ("Van Waters") in the District Court for the County of El Paso, State of Colorado, on September 1, 1989. Pursuant to 28 U.S.C. § 1441(a), the case was removed to the United States District Court for the District of Colorado, which had original jurisdiction over the case based on diversity of citizenship. 28 U.S.C. § 1332.

In its complaint, AP&G states, in substance, that it owns certain ranch property in Colorado (the "Property") upon which AP&G's predecessors-in-interest operated a wooden fence post treatment facility from approximately 1960 until 1972. AP&G alleges that the wood treatment facility used penta products that were manufactured, supplied, or distributed by the respondents, and that the Property became contaminated with penta and other chemicals contained in those penta products as a result of drips and spills occurring during the

course of the wood treatment operation. In the fall of 1987, after AP&G had succeeded to ownership of the Property, one of AP&G's employees on the Property informed AP&G that he had received a medical diagnosis of penta poisoning. Subsequent soil tests revealed penta contamination on the Property. AP&G commenced a remediation program on the Property, incurring substantial expense. AP&G alleges that the respondents' failure to provide sufficient warnings regarding their penta products, including their failure to provide any caution against soil contamination, was a direct cause of the Property contamination, and AP&G asserts Colorado state tort law claims of negligence and strict liability based on the alleged failure to warn.

On January 31, 1990, Dow filed a summary judgment motion, which Van Waters subsequently joined in. Among other things, the respondents contended that AP&G's state tort law claims of inadequate warning are preempted by FIFRA. The motion was extensively briefed, oral argument was had (at which time the District Court denied all grounds for summary judgment except that based on FIFRA preemption), and on October 22, 1990, the District Court issued its order denying the respondents' motion for summary judgment on FIFRA preemption grounds. *See* Pet. App. 7a. The respondents' subsequent motion for reconsideration was denied; however, the District Court certified the question of FIFRA preemption for interlocutory appeal to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292(b). *See* Pet. App. 27a.

2. On February 26, 1991, the Court of Appeals granted the respondents' petition for leave to appeal under 28 U.S.C. § 1292(b). *See* Pet. App. 29a. The sole issue on appeal was whether the federal government, through FIFRA, has preempted AP&G's state-law tort claims that are based on the respondents' failure to provide adequate warnings about the harmful effects of the penta products

that were used on the Property by AP&G's predecessors-in-interest from approximately 1960 to 1972. The respondents argued that AP&G's claims are expressly preempted by 7 U.S.C. § 136v(b), which became part of the FIFRA statute in late 1972, and which prohibits states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." Alternatively, the respondents argued that AP&G's claims are impliedly preempted by (i) the current FIFRA's occupation of the field of pesticide labeling and (ii) a conflict between AP&G's claims of inadequate warning and the current FIFRA's regulation of pesticides.

In response, AP&G argued that, under the standards of statutory construction set forth by this Court, only the FIFRA statute and regulations in effect prior to the enactment of the 1972 FIFRA amendments should be considered for purposes of the preemption analysis in this case, where the respondents' acts and omissions that gave rise to AP&G's claims occurred prior to the 1972 enactment, and where Congress expressly directed that, for purposes of determining liability to third persons in respect of any act or omission occurring prior to the 1972 FIFRA enactment, FIFRA should be treated as if the 1972 legislation had not been enacted. However, AP&G additionally contended that, whether pre-1972 or current federal law is applied, FIFRA does not preempt AP&G's tort claims under this Court's framework for preemption analysis, where, among other things, (i) there is no evidence of any legislative intent to insulate pesticide manufacturers from common-law liability through FIFRA; (ii) FIFRA provides no alternative relief for persons injured by inadequate pesticide warnings, including warnings that have never even been submitted to or approved by either of the federal agencies that have administered FIFRA; and (iii) the agencies that have administered FIFRA have themselves expressed their belief

that FIFRA provides minimum labeling standards, but does not dictate everything that goes on a label and does not relieve a company of its responsibility for providing adequate labeling.[1]

On March 6, 1992, the Court of Appeals issued its original opinion in this case, holding that "state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law." *See* Pet. App. 30a. In reaching that conclusion, the court first rejected AP&G's contention that the FIFRA preemption analysis in this case should be governed by the FIFRA statute and regulations that were in effect when the respondents' allegedly tortious acts and omissions occurred, and instead held that the preemption issue should be analyzed under FIFRA as it currently exists. *See* Pet. App. 32a-35a. The court then acknowledged a conflict in the courts regarding the issue of whether the current FIFRA preempts state tort claims based on labeling and alleged failure to warn. *See* Pet. App. 37a. The Eleventh Circuit had held such claims to be impliedly preempted. *See Papas v. Upjohn Co.*, 926 F.2d 1019, 1021-26 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 112 S. Ct. 3020 (1992), *on remand*, 985 F.2d 516 (11th Cir. 1993). The D.C. Circuit had held such claims to be neither expressly nor impliedly preempted. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539-43 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). In the instant case, the Court of Appeals expressly rejected the D.C. Circuit's holding in *Ferebee* and held that AP&G's tort claims based on inadequate warning and labeling were impliedly preempted by FIFRA. *See* Pet. App. 37a-42a.

On March 20, 1992, AP&G filed a petition for rehearing, as well as a suggestion for rehearing en banc,

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[1] Under FIFRA, companies draft their own product labels; two different manufacturers may therefore have markedly different labels affixed to their chemically identical products.

on the issue of whether the preemption analysis should be governed by FIFRA amendments that were enacted after the respondents' allegedly tortious acts and omissions occurred. The petition for rehearing and the suggestion for rehearing en banc were summarily denied. *See* Pet. App. 46a.

3. On July 30, 1992, AP&G filed its first petition for a writ of certiorari ("AP&G's First Petition") in this Court. AP&G's First Petition presented two questions for review: (i) whether FIFRA preempts state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products, and (ii) whether the statutory and regulatory regime that was established after FIFRA was amended in 1972 now operates to preempt state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the 1972 amendments to FIFRA. *See* AP&G's First Petition at i. AP&G's First Petition contended that both questions had been decided by the Court of Appeals in a manner contrary to this Court's analysis in *Cipollone*, and AP&G's First Petition further stated, with respect to both questions, that this Court should, at a minimum, grant AP&G's petition, vacate the judgment, and remand the case to the Court of Appeals for further consideration in light of *Cipollone*. *See, e.g., id.* at 11, 23, 27.

In their opposition brief to AP&G's First Petition (the "First Opposition Brief"), the respondents acknowledged that two issues were being presented for certiorari review: "Completely apart from its pre-emption argument, Petitioner urges this Court to grant certiorari on the issue of whether the Tenth Circuit should have applied the codification of FIFRA existing prior to the 1972 amendments to the statute." *See* First Opposition Brief at 22. The respondents contended, among other things, that this choice-of-law issue was not addressed in *Cipollone*, so, if

this Court elected to grant certiorari on the other issue, it should nevertheless elect to leave the ruling of the Court of Appeals on the choice-of-law issue undisturbed. *See* First Opposition Brief at 23. In its reply (the "First Reply Brief"), AP&G pointed out that the respondents were merely seeking "to shelter this most questionable aspect of the Tenth Circuit's holding from this Court's review or the Tenth Circuit's reconsideration upon remand." *See* First Reply Brief at 8. AP&G continued to argue that the ruling of the Court of Appeals on the issue was contrary to *Cipollone,* and continued to urge this Court to, at a minimum, grant AP&G's First Petition, summarily vacate the judgment, and remand the case for further consideration in light of *Cipollone*. *See id.* at 10.

On October 13, 1992, this Court granted AP&G's First Petition without limitation, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *Cipollone*. *See* Pet. App. 43a.

4. On October 19, 1992, the Court of Appeals ordered the parties to submit memorandum briefs, of not more than fifteen pages, addressing the applicability of *Cipollone*. *See* Pet. App. 44a. AP&G's brief argued that, in accordance with the *Cipollone* analysis, the Court of Appeals was required to apply the version of FIFRA in effect at the time of the respondents' allegedly tortious acts and omissions to determine whether AP&G's later-accruing common-law tort claims based on those acts and omissions are preempted. AP&G noted that, under such an analysis, there can be no serious contention that AP&G's claims are preempted. Moreover, AP&G argued that, even if the Court of Appeals were to apply the current FIFRA to the preemption analysis, *Cipollone* would require affirmance of the District Court's holding that the respondents had failed to establish that FIFRA preempts AP&G's claims based on the inadequacy of labels on, or warnings relating to, the respondents' pesticide products. In addition, because AP&G believed that

the respondents might continue to attempt to shelter from reconsideration the Court of Appeals' application of current rather than pre-1972 FIFRA, AP&G submitted, for the sole purpose of enabling the Court of Appeals to view the scope of questions that had been presented and arguments that had been made to this Court, a motion to file an "Appellee's Appendix on Remand" containing a copy of AP&G's First Petition, the First Opposition Brief, and the First Reply Brief.

The respondents' memorandum brief regarding *Cipollone* devoted precisely one footnote to the question of whether pre-1972 or current FIFRA should govern the preemption analysis. The respondents conceded that this Court "'apparently vacated the entirety of [the Court of Appeals'] prior decision"; however, the respondents contended that *Cipollone* did not address the choice-of-law issue and suggested that the Court of Appeals should "reaffirm" its prior holding on the issue based on pre-*Cipollone* cases.

On January 5, 1993, the Court of Appeals issued an order denying AP&G's request for oral argument, denying AP&G's motion to file the supplemental appendix submitted with its brief, refusing to reconsider, in light of *Cipollone*, its holding that current FIFRA, rather than pre-1972 FIFRA, applies to the preemption analysis, and holding that, "[t]o the extent that state tort claims in this case require a showing that [the respondents'] labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *See* Pet. App. 1a-6a. In addition, in the final paragraph of its opinion, the Court of Appeals held that *Cipollone* supported its previous judgment in this case, and the court would therefore "adhere" to the opinion that had been vacated by this Court. *See* Pet. App. 6a.

On January 19, 1993, AP&G filed a petition for rehearing, as well as a suggestion for rehearing in banc.

Among other things, AP&G contended that the Court of Appeals had erred in narrowly construing this Court's remand order and refusing to reconsider the issue of whether current FIFRA, rather than pre-1972 FIFRA, should govern the preemption analysis. AP&G urged that, upon reconsideration, the Court of Appeals should hold that pre-1972 FIFRA governs the analysis and does not preempt AP&G's claims. On February 9, 1993, the Court of Appeals summarily denied the petition for rehearing and the suggestion for rehearing in banc. *See* Pet. App. 48a.

REASONS FOR GRANTING THE WRIT

I. AFTER THIS COURT ORDERED RECONSIDERATION IN LIGHT OF *CIPOLLONE*, THE COURT OF APPEALS ERRONEOUSLY REFUSED TO RECONSIDER ITS PRIOR HOLDING THAT CURRENT FIFRA, RATHER THAN PRE-1972 FIFRA, GOVERNS THE PREEMPTION ANALYSIS IN THIS CASE. BECAUSE PRE-1972 FIFRA CLEARLY GOVERNS, AND BECAUSE THERE CAN BE NO SERIOUS CONTENTION THAT PRE-1972 FIFRA PREEMPTS AP&G'S COMMON-LAW CLAIMS, REVERSAL IS NOW WARRANTED.

As this Court has previously noted, *see, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. ——, 111 S. Ct. 2476, 2479 (1991), the statutory and regulatory regime that currently exists under FIFRA is the result of a comprehensive revision of FIFRA undertaken by Congress in 1972 through the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (the "1972 Legislation"). Prior to the 1972 Legislation, FIFRA ("pre-1972 FIFRA") was primarily a licensing and labeling statute that (i) required all pesticides sold in interstate commerce to be registered with the Secretary of Agriculture (the "Secretary")[2] and (ii)

[2] In 1970, regulatory authority under FIFRA was transferred from the Department of Agriculture ("USDA") and its Secretary

contained "general standards setting forth the types of information necessary for proper labeling of a registered pesticide . . . ." *Monsanto,* 467 U.S. at 991. Like the current FIFRA, pre-1972 FIFRA had no provisions for private actions or for compensation for injuries caused by pesticides.

The limited role of pre-1972 FIFRA, even in the area of product labeling, is apparent in FIFRA regulations that were published in 1959 and were effective and substantially unchanged throughout the 1960s and early 1970s. For example, the regulations made various suggestions for pesticide labeling statements, but made clear that the exact wording used in the suggested labeling statements was not obligatory; moreover, manufacturers were told to use any added warnings or caution statements that any special characteristics or uses of their formulations indicated were necessary. *See, e.g.,* 24 Fed. Reg. 10,835, 10,855 (1959) (codified at 7 C.F.R. § 362.116(d)). In the event that a registrant contemplated changes "in substance" in the labeling of a product, the regulations prescribed a procedure for obtaining a new or amended registration incorporating the changed label. *See* 24 Fed. Reg. at 10,848 (codified at 7 C.F.R. § 362.106(h)). In general, the regulations quite clearly and explicitly set out the very limited role of pre-1972 FIFRA, its registration process, and its labeling standards:

> (1) Registration is a device to bring the economic poison to the attention of the Department of Agriculture and to furnish an opportunity to correct *obvious* faults in labeling. It does not place the responsibility for correct labeling upon the Depart-

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to the newly-formed Environmental Protection Agency ("EPA") and its Administrator. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). FIFRA regulations were transferred to EPA without change, except that the words "Department of Agriculture" in the regulations were deemed to mean "Environmental Protection Agency." *See* 7 C.F.R. Ch. XXVII (1971).

> ment though the Department does advise relative to revision of labeling, on the basis of available information. . . .
>
> (2) Registration is not to be understood as indicating the Department of Agriculture's approval or recommendation of the economic poison.
>
> (3) Federal registration does not remove the requirements for state registration in those states which require registration.

24 Fed. Reg. at 10,847 (codified at 7 C.F.R. §§ 362.106 (d)(1)-(3)) (emphasis added). *See also* 24 Fed. Reg. at 10,849 (codified at 7 C.F.R. § 362.109(d)): "No references to [a guarantee that a product has been registered under FIFRA] may be made on the label or in the labeling of the product since such reference would be likely to give the purchaser an unwarranted sense of security."

As the Court of Appeals acknowledged in its original opinion in this case, *see* Pet. App. 33a, pre-1972 FIFRA contained no provisions specifically restricting state authority over pesticide labeling, in sharp contrast to the restrictions found in the current FIFRA's express preemption clause at 7 U.S.C. § 136v(b).

In light of the very limited role of pre-1972 FIFRA and its lack of any preemptive language regarding state authority over pesticide labeling, any contention that pre-1972 FIFRA might preempt state tort claims based on inadequate labeling or warning would seem highly implausible. It appears that those courts that have considered the question have concluded as much.[3]

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[3] *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 995 n.14 (2d Cir. 1980) (noting that FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates), *cert. denied*, 454 U.S. 1128 (1981); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (proceeding on the assumption that FIFRA did not occupy the field). *Cf. Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937,

In the instant case, it is undisputed that, although AP&G's claims of inadequate warning did not accrue under Colorado state law (for purposes of, for example, statutes of limitation) until after the discovery of penta contamination in 1987, those claims are based on acts and omissions that occurred prior to the 1972 Legislation. Moreover, as AP&G has repeatedly pointed out throughout this case, § 4(e) of the 1972 Legislation provides that,

> [f]or purposes of determining any criminal or civil penalty *or liability to any third person* in respect of any *act or omission* occurring before the expiration of the periods referred to in this section [which in no event could be earlier than October 21, 1972, when the 1972 Legislation was enacted], the Federal Insecticide, Fungicide, and Rodenticide Act shall be treated as continuing in effect as if this Act had not been enacted.

See 1972 U.S.C.C.A.N. at 1170 (emphasis added). On the basis of that express congressional directive that the 1972 Legislation have only prospective application, and on the basis of this Court's teachings regarding the propriety of applying subsequent enactments to prior conduct, AP&G argued in the courts below that the FIFRA preemption issue must, under the facts of this case, be analyzed under the FIFRA statute and regulations as they existed prior to the 1972 Legislation.

Both of the courts below rejected AP&G's contention, and elected to analyze the preemption issue under the current FIFRA regime. The District Court, citing this Court's opinion in *Bradley v. School Bd. of City of Rich-*

940, 944 (D.S.C. 1969) (manufacturer's duty to warn is over and above USDA's requirements); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15, 17-19 (Tex. Civ. App. 1968) (mere compliance with labeling standards of FIFRA and Texas Insecticide, Fungicide, and Rodenticide Act does not establish freedom from negligence as a matter of law).

mond, 416 U.S. 696 (1974), asserted that a court "is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice." Pet. App. 11a. Subsequently, in its original, later-vacated opinion, the Court of Appeals, though recognizing that *Bradley*'s presumption in favor of statutory retroactivity appears to be in conflict with this Court's later decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), *see* Pet. App. 34a n.1, nevertheless agreed with the District Court that pre-1972 FIFRA should not govern the preemption analysis. The Court of Appeals stated that applying the 1972 Legislation to this case simply does not present any issue of retroactivity, both because AP&G's cause of action "arose" after 1972 and because, even if the cause of action "ripened" prior to 1972, " 'a statute is not rendered retroactive merely because the facts or requisites upon which a subsequent action depends are drawn from a time antecedent to the enactment.' " *See* Pet. App. 35a (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972)). The only affirmative basis the Court of Appeals gave for applying the current FIFRA statute to this case was the court's expressed belief that a jury award today, though based on acts or omissions committed prior to the 1972 Legislation, would nevertheless have "an impact on FIFRA as it currently exists," because such an award would cause manufacturers to change their labels. *See id.* In concluding that the current FIFRA statute governs the preemption analysis in this case, neither court below even acknowledged the contrary congressional directive in § 4(e) of the 1972 Legislation, despite repeated citations to it in the parties' briefs, at oral argument, and in a petition for rehearing.

When this case first came before this Court, AP&G suggested several reasons for this Court's plenary review or summary reversal of the decision of the Court of Appeals to apply current FIFRA, rather than pre-1972 FIFRA, to the preemption analysis. *See* AP&G's First

Petition at 21-23. However, because the holding by the Court of Appeals on this "choice-of-law" issue was also contrary to this Court's analysis in the intervening decision of *Cipollone*, which consistently applied the federal statute in effect at the time of each allegedly tortious act of inadequate warning to determine whether later-accruing claims based on such act would be preempted, AP&G suggested that it might also be appropriate simply to vacate the judgment of the Court of Appeals and remand the case for further consideration of the issue in light of *Cipollone*. *See, e.g.*, AP&G's First Petition at 11, 23.

Following this Court's order of remand, directing further consideration in light of *Cipollone*, AP&G pointed out to the Court of Appeals that, under the *Cipollone* analysis, the court's now-vacated decision to apply current FIFRA, rather than pre-1972 FIFRA, had been erroneous and should not be reinstated. As AP&G noted, although the precise preemptive scope of each of the two federal cigarette labeling acts (the Federal Cigarette Labeling and Advertising Act (the "1965 Act")[4] and its successor, the Public Health Cigarette Smoking Act of 1969 (the "1969 Act")[5]) was the subject of great debate in *Cipollone*, there was one point on which there was no dissent—this Court would apply the federal statute in effect at the time of each allegedly tortious act or omission to determine whether later-accruing common-law tort claims based on each act or omission would be preempted.[6] Moreover,

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[4] Pub. L. No. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340.

[5] Pub. L. No. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340.

[6] *See, e.g.*, 112 S. Ct. at 2621-22 ("insofar as claims under either failure to warn theory require a showing that *respondents' post-1969 advertising or promotions* should have included additional, or more clearly stated, warnings, those claims are pre-empted") (Stevens, J., for the Court) (emphasis added); *cf. id.* at 2635 ("To the extent petitioner's claims are premised specifically on

the date on which each of the various plaintiffs' claims had accrued under state law—which was, at the earliest, July 23, 1981, when a spot, later diagnosed as cancer, was discovered on Rose Cipollone's lung during her regular medical check-up, *see Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 579-81 (3d Cir. 1990) (discussing application of two-year statute of limitation), *rev'd in part as to other matters*, 112 S. Ct. 2608 (1992)—would in no way determine which version of the federal statute governs the preemption analysis.

As AP&G also pointed out to the Court of Appeals, there is even less reason in the context of FIFRA to protect tortious conduct through the application of a subsequently enacted preemption provision. Unlike the statutory scheme under consideration in *Cipollone* (where there was apparently no express congressional directive to support this Court's application of pre-1969 law to pre-1969 conduct, and where there was even legislative history suggesting that the 1969 Act's preemption provision was only intended to "clarify" rather than change the 1965 Act's preemptive reach, *see* 112 S. Ct. at 2619), the introduction of preemptive language in FIFRA was accompanied by an express congressional directive, in § 4(e) of the 1972 Legislation, that pre-1972 FIFRA was to continue to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation.[7] Moreover, the lone affirmative basis that had been

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respondents' failure (during the period in which the 1965 Act was in force) to include in their advertising any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, pre-empted.") (opinion of Scalia, J.) (emphasis added; emphasis in original omitted).

[7] *See also, e.g., Goldstein v. California*, 412 U.S. 546, 551-52 (1973) (where congressional amendments to federal copyright law in 1971 expressly applied only to sound recordings that were "fixed" on or after February 15, 1972, the amendments could have no preemptive effect on state-law claims regarding recordings that were "fixed" prior to February 15, 1972).

given by the Court of Appeals for applying the current FIFRA statute—that is, its speculation that a jury award today, based on inadequate pesticide warning labels distributed twenty or more years ago, would cause manufacturers to change their labels tomorrow, thus having "an impact on FIFRA as it presently exists," *see* Pet. App. 35a—is no more persuasive in the pesticide-labeling context than it is in the cigarette-labeling context; among other things, in both contexts, manufacturers would presumably feel pressured to change their labels to avoid future liability only if the *current* federal statute did *not* preempt common-law tort claims that are based on the inadequacy of *current* labels.

In its opinion on remand, the Court of Appeals once again rejected AP&G's position. Characterizing the issue as a dispute about "when [AP&G's] claim arose," *see* Pet. App. 3a, the court first speculated that Rose Cipollone's claim [8] must have been "a continuing claim" that began with her exposure to the consequences of tobacco smoke in 1942, *see id.*, thus requiring this Court in *Cipollone* to analyze the preemptive scope of pre-1969 law as well as post-1969 law. The Court of Appeals contrasted that with the instant case, where, according to the court, "[n]either [AP&G] nor any of its employees had any exposure to defendants' products until [AP&G] moved onto the contaminated premises." *See id.* at 4a. However, according to the court, there was "a more significant reason" for rejecting AP&G's position on this issue—*Cipollone* never raised or decided an issue "about when the plaintiff's claim arose in that case." *See id.* On that basis, the Court of Appeals refused to reconsider its holding on the "choice-of-law" issue and refused to "augment the record" with the documents that had been filed with

[8] The Court of Appeals apparently failed to recognize that *Cipollone* involved claims of *three* persons—Rose, Antonio, and Thomas Cipollone—and the petitioner in this Court was Thomas Cipollone, individually and as executor of his parents' estates.

this Court and that AP&G had then submitted to the Court of Appeals to allow that court to view the scope of questions that had been presented and arguments that had been made to this Court. *See id.* at n.2.

In its subsequent petition for rehearing, AP&G contended that, if there was no discussion in *Cipollone* about when the various plaintiffs (Rose, Antonio, and Thomas Cipollone) were injured or when their claims "arose," that was only because one of the few issues that all of the justices of this Court seemed to agree on in *Cipollone* was that the preemption analysis was to be governed by the federal law in effect at the time of the allegedly tortious acts of inadequate labeling or failure to warn; there was simply no reason to consider any "issue" about when injuries occurred or claims arose.[9] Once again, however, AP&G's petition for rehearing was summarily denied. *See* Pet. App. 48a.

The Court of Appeals has been given every opportunity to articulate a coherent legal basis for its various suggestions that the governing law in the preemption analysis should be the law in effect at the time of injury, or the law in effect at the time the claim "arose," or the law in effect at the time suit was filed, or the law in effect at the time judgment was rendered. It has not done so,

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[9] AP&G also pointed out to the Court of Appeals that its speculative distinction between Rose Cipollone's "continuing claim" and AP&G's injuries was not only legally irrelevant (because the preemption analysis should be governed not by the law in effect at the time of injury or at the time a claim arose, but rather by the law in effect at the time of the allegedly inadequate warning or labeling, which, in the instant case, was prior to the 1972 Legislation), but also factually wrong; the record is clear that there was a continuity of ownership and operations on the Property for many years, and AP&G was simply the successor-in-interest to all assets and liabilities of the corporation ("Arkansas-Platte & Gulf, Inc.") that had owned the Property from 1966 to 1985. In that respect, perhaps, AP&G occupied a position similar to that of petitioner Thomas Cipollone in his role as executor of his mother's estate.

nor has it explained why it should not be required to apply the law in effect at the time of the allegedly tortious act or omission in labeling or warning, as *Cipollone* indicates should be done. In light of (i) the express congressional directive that pre-1972 FIFRA was to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation, (ii) the manifest implausibility of the contention that the express preemption provision in the 1972 Legislation was intended to grant immunity for labeling and warning practices that were unprotected, tortious acts and omissions when they were engaged in, (iii) *Cipollone*'s directive that express preemption provisions are to be narrowly read, *see, e.g.*, 112 S. Ct. at 2618, (iv) *Cipollone*'s application, in its preemption analysis, of the law in effect at the time of the allegedly tortious labeling or warning,[10] and (v) the decision of the Court of Appeals to narrowly construe this Court's remand order and to refuse to reconsider the prior holding on this issue in light of *Cipollone*, AP&G believes that it may now be most appropriate for this Court to summarily reverse the opinion of the Court of Appeals on this "choice-of-law" issue and remand the case with appropriate instructions.[11] However, in the alternative, AP&G requests that the petition be granted with plenary review to follow.[12]

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[10] *See also, e.g., Bennett v. New Jersey*, 470 U.S. 632, 638-46 (1985) (absent clear legislative intent to the contrary, substantive provisions of 1978 statutory amendments would not be retroactively applied in determining if funds were misused during 1970-1972; instead, the stricter standards that were in effect at the time of the allegedly wrongful conduct would be applied).

[11] *See, e.g., Powell v. Texas*, 492 U.S. 680, 680-81, 682-83, 686 (1989) (summarily reversing where lower court inadequately complied with reconsideration order); *Henry v. City of Rock Hill*, 276 U.S. 776, 776-78 (1964) (same).

[12] *See, e.g., United States v. Sharpe*, 470 U.S. 675, 680-81 (1985) (reversing upon plenary review after lower court, having received

II. AFTER THIS COURT VACATED THE JUDGMENT OF THE COURT OF APPEALS AND ORDERED RECONSIDERATION IN LIGHT OF *CIPOLLONE*, THE SUBSEQUENT HOLDING BY THE COURT OF APPEALS THAT CURRENT FIFRA EXPRESSLY PREEMPTS STATE COMMON-LAW TORT CLAIMS HAS REVIVED AND DEEPENED A SPLIT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

The first federal circuit court decision on post-1972 FIFRA's preemptive effect on state common-law claims of inadequate warning or labeling was the D.C. Circuit's decision in *Ferebee*,[13] which was issued in 1984, and which held that FIFRA neither expressly nor impliedly preempts state common-law actions based on inadequate labeling of pesticides. *Ferebee* stood as the only federal circuit court decision on this preemption issue until the Eleventh Circuit's 1991 *Papas* decision and the Tenth Circuit's original decision last year in the instant case. In each of those two decisions, the court acknowledged the holding in *Ferebee* but refused to follow it, finding instead that FIFRA impliedly preempts state tort claims of inadequate labeling or warning.

Subsequently, one state court of last resort and one additional federal circuit court ruled on this FIFRA preemption issue, with both courts expressly acknowledging the conflict among *Ferebee*, *Papas*, and the Tenth Circuit's original opinion in this case. In *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992), the Supreme Court of

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reconsideration order, declined "to reexamine [its] principal holding or to reargue the same issues that [had been] addressed in detail in [its] original majority and dissenting opinions").

[13] In 1980, the Second Circuit had stated broadly, and perhaps as dicta unnecessary to its disposition of the case, that "FIFRA was not intended to preempt state law even with respect to those matters which it specifically regulates." *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d at 995 n.14.

Arkansas held that "state common law tort claims for inadequate labeling are neither expressly nor impliedly preempted by FIFRA." 834 S.W.2d at 141-45. In *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), a case involving an EPA-registered herbicide, *see id.* at 1303, the Fourth Circuit reversed a district court's summary judgment that all of the plaintiffs' common-law tort claims were preempted by FIFRA, and instead held that, though a common-law claim could be preempted to the extent that it was based on a duty that "would impose a labeling requirement inconsistent with those established by FIFRA," *id.* at 1308, state common-law claims that are "based on breach of a federally imposed standard," *id.*, or based on a state-imposed standard that is identical to the federal standard, *see id.* at 1306, would not conflict with federal law and would not be preempted by FIFRA.

Five days after the Fourth Circuit's order reversing summary judgment in *Worm*, this Court issued its decision in *Cipollone*, holding that, where a federal statute contains an express preemption provision that provides a " 'reliable indicium of congressional intent with respect to state authority,' " that provision is to be given both exclusive and narrow effect, and there can be no resort to principles of implied preemption. *See, e.g.*, 112 S. Ct. at 2618 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)). In view of the current FIFRA's express preemption provision at 7 U.S.C. § 136v(b), the circuit court's implied preemption analysis in *Papas* and in the instant case now appeared to be clearly contrary to this Court's own framework for preemption analysis. Indeed, five days after the *Cipollone* decision, the circuit court opinion in *Papas* was vacated by this Court and remanded for further consideration in light of *Cipollone*.[14]

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[14] *See Papas v. Zoecon*, 112 S. Ct. 3020 (1992), *vacating Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991).

As matters developed, however, it became clear that neither this Court's guidance in *Cipollone* nor its summary disposition and remand of *Papas* would resolve the split in judicial authority regarding FIFRA's preemptive reach in matters of labeling and warning.[15] Three decisions illustrate the difficulties courts have had in interpreting and applying *Cipollone* in the context of FIFRA preemption.

1. Several weeks after this Court's decision in *Cipollone*, Judge Jack Weinstein of the Eastern District of New York, writing in *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992), noted that the D.C. Circuit's opinion in *Ferebee* "remains a leading case" on the issue of FIFRA preemption of common-law failure-to-

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[15] Numerous courts had spoken on this preemption issue prior to the remand in *Papas*. Among the many federal district court opinions on the issue, cases finding no preemption included *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928 (S.D. Tex. 1992); *Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339 (D. Mont. 1991); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136, 1990 U.S. Dist. LEXIS 19395 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224, 1989 U.S. Dist. LEXIS 17548 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986). Cases finding implied preemption included *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989). Cases finding express preemption included *Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406-08 (E.D. Mich. 1987).

warn claims, *see* 797 F. Supp. at 1138; however "[a]pplying the somewhat subtle distinctions of *Cipollone*," Judge Weinstein found that FIFRA does expressly preempt a limited set of claims involving allegations that a pesticide with an EPA-approved label is mislabeled. *See id.* at 1140. Judge Weinstein made clear, however, that FIFRA does not preempt, for example, claims that warnings apart from labels or packaging should have been used. *Id.* Judge Weinstein also rejected the defendants' claims of implied preemption, holding that, "even ignoring the directive in *Cipollone* to focus exclusively on express preemption clauses," "[t]he federalism issues are too important to warrant foreclosing recovery to an injured party on a questionable theory of implied preemption." *See id.* at 1141.

2. Approximately one month after Judge Weinstein's endeavor to apply the "somewhat subtle distinctions of *Cipollone*," the Nevada Supreme Court proclaimed that it did not find *Cipollone* "instructive" on whether FIFRA preempts state tort claims, and cited with approval Justice Blackmun's statement in *Cipollone* that he could "only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision." *See Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 933 n.2 (Nev. 1992) (quoting *Cipollone*, 112 S. Ct. at 2631 (Blackmun, J., concurring in part and dissenting in part)), *cert. denied*, 61 U.S.L.W. 3731 (U.S. April 26, 1993). The Nevada court proceeded to hold that, although FIFRA does not *expressly* preempt state tort claims of inadequate labeling, *see id.* at 933-34, it does *impliedly* preempt them. *See id.* at 934-38.[16]

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[16] As was later noted, the *Davidson* court thus "ignored *Cipollone*'s clearest directive—that when a statute contains an express preemption provision, a court should confine its analysis to an interpretation of the scope of the specific provision". *See The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 356 (1992).

3. In *Couture v. Dow Chem. Co.*, 804 F. Supp. 1298 (D. Mont. 1992), the defendants acknowledged that the district court had previously rejected the position that state common-law tort claims are preempted by FIFRA, *see Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339, 1342-45 (D. Mont. 1991), *appeal filed*, No. 91-36201 (9th Cir. Apr. 21, 1992), but urged the court to "retract" its holding in *Montana Pole* and instead find that this Court's recent pronouncements on preemption analysis had undermined the D.C. Circuit's holding in *Ferebee* and now warranted a holding of preemption. *See* 804 F. Supp. at 1300-03. The district court rejected the defendant's contentions and held that, among other things, this Court's preemption analysis in *Cipollone* supported the conclusion that common-law tort claims of inadequate warning are not preempted by FIFRA. *See id.* at 1301-03. The district court also refused to certify the preemption issue for interlocutory appeal, since, "cognizant of the pendency of a petition for certiorari to the United States Supreme Court in *Arkansas-Platte & Gulf Partnership*, the court is confident the preemption issue will be resolved by the United States Supreme Court in order to resolve the obvious split extant between the circuit courts of appeal." *Id.* at 1303 n.5.

On October 13, 1992, this court did, in fact, vacate the opinion of the Court of Appeals in this case—mitigating, if not precisely resolving, the circuit split. However, on January 5, 1993, the Court of Appeals issued its opinion on remand, holding that FIFRA expressly preempts state tort claims to the extent that they "require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA . . . ." *See* Pet. App. 6a. The Court of Appeals thereby became the first circuit court or state court of last resort to find that FIFRA expressly preempts common-law tort claims, in conflict with *Ferebee, Alter,* and *Davidson.*

On March 8, 1993, the Eleventh Circuit issued its opinion on remand in *Papas,* holding that FIFRA "expressly preempts state common-law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging." *See Papas v. Upjohn Co.,* 985 F. 2d 516, 520 (11th Cir. 1993).

There are now six published opinions from federal circuit courts and state courts of last resort regarding FIFRA's preemption of state common-law tort claims based on inadequate warning. They variously hold state common-law tort claims of inadequate warning to be expressly preempted, impliedly preempted, and not preempted at all. Moreover, lower court opinions issued after the opinion on remand in this case show a continuing conflict. *Compare MacDonald v. Monsanto Co.,* 813 F. Supp. 1258 (E.D. Tex. 1993) (applying *Cipollone,* rejecting the Tenth Circuit's opinion on remand in this case, and adopting the D.C. Circuit's holding in *Ferebee*) *with Levesque v. Miles Inc.,* Civil No. 92-94-JD, 1993 U.S. Dist. LEXIS 3395 (D.N.H. Mar. 18, 1993) (following the Tenth Circuit's holding upon remand in this case that FIFRA expressly preempts common-law failure-to-warn claims). The conflict among the holdings and competing rationales of *Ferebee, Alter, Worm, Davidson, Papas,* and the decision of the Court of Appeals in this case warrants resolution by this Court. *See* Rules 10.1 (a) & (b), Rules of the Supreme Court of the United States.

III. IN HOLDING THAT THE CURRENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING, THE COURT OF APPEALS HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Having refused to reconsider its holding that current FIFRA governs the preemption analysis, the Court of Appeals, in its opinion following remand, examined the current FIFRA's express preemption provision at 7 U.S.C. § 136v(b), which states that "[s]uch state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The court (i) held that § 136v(b) provides a " 'reliable indicium of congressional intent with respect to state authority,' " *see* Pet. App. at 5a (quoting *Cipollone*, 112 S. Ct. at 2618), (ii) noted a similarity between § 136v(b)'s "requirements" language and the 1969 Act's language ("[n]o requirement or prohibition") that was construed by this Court as preempting certain common-law claims, *id.*, (iii) inferred that a common-law duty to warn "is no less a 'requirement' in the preemption scheme than a state statute imposing the same burden," *id.* at 6a, and (iv) concluded that, "[t]o the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Id.*[17]

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[17] In addition, the court stated, in a final paragraph, and without elaboration, "[w]e hold *Cipollone* supports our previous judgment in this case. Accordingly, we ADHERE to the opinion previously announced in 959 F.2d 158." *See* Pet. App. at 6a (emphasis in original). Of course, the court's "opinion previously announced in 959 F.2d 158" held that "state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law." *See* Pet. App. at 42a. However, as *Cipollone* makes

By focusing primarily upon the similarity between § 136v(b)'s proscription of certain state-imposed "requirements" and the 1969 Act's proscription of certain state-imposed "requirement[s] or prohibition[s]," the Court of Appeals misconstrued the teachings of *Cipollone*. In *Cipollone*, this Court analyzed the express preemption provisions of the 1965 Act and the 1969 Act by considering the precise wording of the provisions, the statutory statement of purpose, the context of the congressional enactments, and general principles of statutory construction that are consistent with the general presumption against preemption. *See* 112 S. Ct. at 2618-19. Under a similar analysis, § 136v(b), like the preemption provision in the 1965 Act, can preempt only positive enactments, and not common-law damage actions, for the following reasons.

First, like the preemptive language in the 1965 Act, "Congress spoke precisely and narrowly" [18] in § 136v(b), where "*Such* State" (emphasis added) refers specifically to a state that, under § 136v(a), is engaged in the "regulation" of the sale or use of a federally registered pesticide in the state. *See* 7 U.S.C. §§ 136v(a)&(b), *supra* p. 2. "The term 'regulation' most naturally refers to positive enactments by [legislative and administrative]

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very clear, having found an express preemption provision that provides a "reliable indicium of congressional intent with respect to state authority," a court cannot, through principles of implied preemption, enlarge the preemptive scope of the federal statute to include areas not encompassed by a narrow construction of the express preemption provision. *See* 112 S. Ct. at 2618. In its petition for rehearing and suggestion for rehearing in banc, AP&G pointed out the inconsistency between the holding of express preemption and the stated adherence to the earlier opinion, and urged the Court of Appeals to modify and clarify its opinion on remand by removing the suggestion that the original, vacated opinion remains good law. The Court of Appeals declined to do so. *See* Pet. App. at 49a.

[18] 112 S. Ct. at 2618.

bodies, not to common law damages actions." 112 S. Ct. at 2619.

Second, regarding § 136v(b)'s restriction on such states' "requirements" for labeling, AP&G would note that, although this Court in *Cipollone* found that the 1969 Act's bar on "*requirement*[*s*] *or prohibition*[*s*] based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes" preempted certain common-law claims of inadequate warning, *see* 112 S. Ct. at 2619-22, the Court did not hold that the term "requirements" *necessarily* includes common-law duties; rather, the Court held that "requirements" *can* include such duties, and in light of the legislative history of the 1969 Act and its very extensive amendment of the 1965 Act's preemptive language, it appears that Congress intended some preemption of common-law actions. *See id.* at 2619-21. Indeed, in holding that the 1965 Act did not preempt common-law claims, this Court stated that "there is no general, inherent conflict between federal pre-emption of state warning *requirements* and the continued vitality of state common-law damages actions," including actions based on failure to warn. *See id.* at 2618 (emphasis added). Such preemption is consistent with a reading of the statute in question as having superseded only positive enactments by legislatures or administrative agencies, *see id.* at 2618-19, and the contrary conclusion of the Court of Appeals was error.

Third, under *Cipollone*, the 1965 Act's preemption provision was intended to further a goal of protecting against nonuniform labeling and advertising regulations—not to preempt common-law claims. *See, e.g.*, 112 S. Ct. at 2616, 2619. In FIFRA, the very heading of § 136v(b)—"Uniformity"—reflects that same narrow goal of preventing a multiplicity of conflicting state regulations; indeed, two sections earlier, the statute expressly refers to the goal of "securing uniformity of regulations." *See* 7 U.S.C. § 136t(b). "Regulations" refers to positive

enactments, not common-law damages actions. *See* 112 S. Ct. at 2620 n.19. Moreover, § 136v(b)'s exclusive concern with uniformity of labeling regulations, rather than preemption of common-law actions, was reinforced when FIFRA was extensively revised in 1988. *See* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655. Despite the D.C. Circuit's prior holding in *Ferebee*, and despite the presence and testimony of pesticide industry lobbyists (including representatives of defendant Dow) at the hearings that preceded the 1988 enactment, *see* H.R. Rep. No. 100-939, *reprinted in* 1988 U.S.C.C.A.N. 3474, 3517, the only change in § 136v(b) was the addition of the heading "Uniformity." "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and AP&G is unaware of any evidence that Congress was not comfortable with the D.C. Circuit's interpretation of § 136v(b) when it re-enacted the text of that section without change.

Finally, this Court has counseled that the purpose of Congress is the "ultimate touchstone" of preemption analysis. *See* 112 S. Ct. at 2617. In this regard, where the current FIFRA, unlike the statute considered in *Cipollone*, (i) does not expressly balance industry interests and public health, *cf. id.* at 2614 n.5 and accompanying text, (ii) does not mandate particular labels on products, but instead permits each manufacturer to draft and modify its own product labels subject to certain guidelines, *see generally* 47 C.F.R. Part 152,[19] and (iii) applies to thousands of different products, the dangers of which are not widely known, AP&G suggests that

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[19] Indeed, EPA itself has acknowledged that pesticide companies often voluntarily add "precautionary" statements to their labels, and do so for "liability reasons." *See* 49 Fed. Reg. at 37,971 (1984).

Congress would not use the language of § 136v(b) to express a "clear and manifest" intention to take away all recourse from persons who are injured by inadequate pesticide labels or warnings. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

In sum, § 136v(b), narrowly construed, cannot reasonably be held to expressly preempt common-law tort claims based on inadequate labeling, and the contrary conclusion of the Court of Appeals was error.

CONCLUSION

The petition for a writ of certiorari should be granted, with summary reversal or plenary consideration to follow.

Respectfully submitted,

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